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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 382

UNITED STATES OF AMERICA, for the Use and Benefit of T/N PLUMBING & HEATING CO.,
Petitioner,

vs.

AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH M. GLICKSTEIN, JR.
1205 Universal Marion Building
Jacksonville, Florida
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, UNITED STATES OF AMERICA, for the use and benefit of T/N PLUMBING & HEATING CO., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The summary judgments entered by the District Court (R 1019-1021; 1027-1028) printed in the appendix hereto, *infra*, pp. A1-A5, are not officially reported. The opinion of the United States Court of Appeals printed in the appendix hereto, *infra*, pp. A6-A15, is reported in 423 F.2d 980.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 19, 1970. A timely petition for rehearing was denied on April 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

The court below affirmed summary judgments in favor of respondents, who were allowed to intervene in the trial court, on the basis that the amounts claimed to be due respondents were not in dispute. In its opinion the court below held:

> "T/N's counterclaim against the United States cannot properly be used as an offset to this tax claim because T/N was not privy to the contract between the United States and Fryd, * * *. Since T/N could not have brought an original suit against the United States, it may not defend by setoff or counterclaim the tax claim of the United States. * * * These summary judgments must, therefore, be affirmed." 423 F.2d 985 (appendix, *infra*, p. A15)

The depositions and pleadings assert the existence of a genuine issue of material fact as to whether or not an employee of the government was negligent in the preparation of the plans and specifications for use by petitioner (R 639-645) in the performance of petitioner's subcontract (out of which the government's tax claim arose), and as to

whether or not American Fire & Casualty Co. had wrongfully taken over petitioner's subcontract. In these circumstances the questions presented are:

1. If the United States intervenes in a Miller Act suit claiming withholding taxes due it arising from the performance of a subcontract, does the Federal Tort Claims Act permit the subcontractor to assert an estoppel, and to counterclaim, recoup or setoff against the government based upon improperly prepared plans [due to negligence of an employee of the government while acting within the scope of his employment], resulting in injury or loss of property?

2. Does the United States consent by implication to full and complete adjudication of all matters and issues which are reasonably incident to its cause of action, including an FTCA counterclaim, recoupment or setoff, and subject itself to the procedure and rules of decision governing the forum which it has sought, when it successfully intervenes in a suit arising under the Miller Act?

3. Whether controverted allegations involving the government's liability under the FTCA and American Fire & Casualty Co. were improperly resolved by summary judgment.

STATUTORY PROVISIONS AND RULES INVOLVED

"28 U.S.C., § 1346. United States as defendant

* * *

"(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, * * * caused by the negligent or wrongful act or omission of any employee of the Government while act-

ing within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

"28 U.S.C., § 2674. Liability of United States

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, * * *."

Rules 8(c), 13(a) and 13(d), Rules of Civil Procedure, 28 U.S.C., dealing with affirmative defenses and counterclaims, provide, in part, as follows:

"Rule 8.

* * *

"(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively * * * estoppel, * * * and any other matter constituting an avoidance or affirmative defense. * * *"

"Rule 13.

"COUNTERCLAIM AND CROSS-CLAIM

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. * * *

* * *

"(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert coun-

terclaims or to claim credits against the United States or an officer or agency thereof."

Rule 56(c), Rules of Civil Procedure, 28 U.S.C., dealing with summary judgment, provides, in pertinent part, as follows:

"Rule 56.

"SUMMARY JUDGMENT

* * *

"(c) Motion and Proceedings Thereon. * * * The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

STATEMENT OF THE CASE

In this Miller Act (40 U.S.C., §§ 270a-270d) case, suit was brought by petitioner, a subcontractor, against Fryd Construction Corporation and its surety, Travelers Indemnity Company,* for the sum of $111,216.17, plus interest and attorney's fees, alleged to be due for labor and material furnished in connection with the performance of its subcontract for certain drainage work on a government construction job at Patrick Air Force Base, Florida, in which Fryd was the general contractor with the government-owner.

*Fryd Construction Corporation and Travelers Indemnity Company are petitioners in Docket No. 1622, October Term, 1969, filed May 28, 1970, and petitioner herein is respondent in that case. All record references herein are to the record filed in No. 1622. The court below reversed a summary judgment for Fryd and Travelers and remand the case for trial (appendix, *infra*, p. A15).

According to the allegations of the complaint (R 1-44), petitioner entered into the subcontract to perform the drainage work for the original price of $66,140.00. Petitioner further alleged that there existed, at the site of performance, unknown to petitioner, man-made interferences and obstructions which were not disclosed to petitioner by the general contractor, nor disclosed by the plans and specifications prepared by the government. Petitioner further alleged that because of those undisclosed interferences and obstructions it furnished labor and material in prosecution of the work of the fair and reasonable value of $202,879.56 instead of the original agreed figure of $66,140.00, and that the net sum of $111,216.17 remained due and unpaid. Prior to instituting the federal litigation, petitioner endeavored to prevail upon Fryd to pursue its administrative remedies, including suit in the Court of Claims, as regards petitioner's claim. The contracting officer rejected the claim, considering it a claim for consequential damages and not subject to renegotiation. His decision contained the following conclusion:

> "Your claim, as presented, is based on an alleged increase in cost of performing unchanged work as a result of the above mentioned changes, and as such, is a claim for consequential damages. I do not find, nor have you cited, any provision of the contract which would allow me to consider such claims. Further, I consider those modifications which have been accepted by you as a full accord and satisfaction as to the matters contained therein, and not subject to renegotiation." (appendix to petition, docket No. 1622, p. 29a)

When the question reached the Armed Services Board of Contract Appeals, the government's explanation was:

> "The Government's explanation for the absence of information as to the location of utilities is that the existing base was crash-constructed in war time." (appendix to petition, docket No. 1622, p. 23a)

Fryd then elected not to pursue its contractual claim in the Court of Claims, leaving petitioner to its Miller Act remedy.

Respondent, American Fire & Casualty Company, surety on petitioner's subcontract, intervened, asserting a right of subrogation and written assignment and indemnification against petitioner for sums which it expended on petitioner's behalf, pursuant to its obligation under the bond. Respondent, United States, intervened, asserting a claim for unpaid withholding taxes, [which arose out of the labor performed in pursuance of the subcontract] against petitioner.

In response to the government's complaint, petitioner interposed the defense of estoppel, setoff and counterclaim for its damages, resulting from the defective or improper plans prepared by the government.

In response to the complaint of respondent, American Fire & Casualty Company, petitioner alleged in its answer that the action on the part of said respondent was wrongful, without basis, reason or justification, voluntary and undertaken by it to the detriment and loss of petitioner.

The allegations of both responses of petitioner are amply supported in the affidavits in opposition to the motions for summary judgment (R 294-312; 994-1013).

In granting the motion for summary judgment, as to American, the court found that there was no genuine issue as to any material fact, although it made no finding or conclusion with respect to the allegations of petitioner dealing with the right of American to take over its subcontract (R 1019-1021; appendix, *infra*, pp. A1-A3).

As to the United States, the summary judgment was based only on the pleadings and affidavits in support of the motion (R 1027-1028; appendix, *infra*, pp. A4-A5) and the

court omitted any reference to the affidavits timely filed in opposition to the government's motion for summary judgment.

The court below affirmed summary judgments for American and the United States (appendix, *infra*, p. A15) because of the expressed opinion that petitioner's counterclaim could not be used as an offset to its tax liability because it "was not privy to the contract between the United States and Ford" and that since, in its opinion, petitioner could not have brought an original suit against the government it could not defend by setoff or counterclaim (appendix, *infra*, p. A15).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. In its opinion, the Court of Appeals affirmed the summary judgment for the United States because petitioner "could not have brought an original suit against the United States". In so holding, the court disregarded petitioner's claims under 28 U.S.C., § 1346(b) and 28 U.S.C., § 2674, commonly referred to as the Federal Tort Claims Act. In its answer to the government's complaint petitioner clearly attributed injury and loss of property to the negligence of the government. The District Court was of the opinion that such relief was not available, as it dismissed petitioner's setoff and counterclaim (R 651) and thereafter entered summary judgment. The court below then expressly held that such relief was not available and affirmed.

While the court was correct as regards privity between petitioner and the government, such is not a prerequisite to liability under the FTCA. Privity of contract would

clearly have destroyed any right of petitioner under the FTCA. *Blanchard* v. *United States*, 341 F.2d 351, cert. den. 382 U.S. 829.

Clearly, the United States is liable under the FTCA in the same manner and to the same extent as a private individual under like circumstances. The circumstances appearing in the record are:

(a) An employee of the government-owner was responsible for the preparation of defective specifications;

(b) The employee knew, or should have known, of the location of the man-made obstructions under the surface which could not be ascertained by the petitioner in the exercise of reasonable care;

(c) Petitioner entered into its subcontract in reliance on the government's specifications;

(d) After petitioner commenced work it discovered the man-made interferences; and

(e) The existence of those interferences and their nondisclosure resulted in injury and loss of property to petitioner through substantial increase in the cost of performance of the subcontract.

In those circumstances, a private individual or private person would be liable in Florida, as well as in most other American jurisdictions, for the wrongful omission of the employee acting within the scope of his employment.

For over 80 years the courts of Florida have ruled that "negligence, constituting a cause of civil action, is such an omission by a responsible person, to use that degree of that diligence and skill which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence causes unintended damage to the latter." *Bucki* v. *Cone* (1889), 25 Fla. 1, 6

So. 160; *Banfield* v. *Addington* (1932), 104 Fla. 661, 140 So. 893.

The facts of the case *sub judice* fit this definition most pertinently. The point that the government's employee, in the preparation of the plans and specifications, omitted to use that degree of care, diligence and skill which it was his legal duty to use for the protection of the subcontractor from injury, was raised and rejected by both courts below. ¶¶ 10, 11, 12 and 13 of petitioner's complaint (R 1-44), supported by affidavits in opposition to defendant's motion for summary judgment (R 294-312; 944-1013), created a genuine issue of material fact as to the negligence of the United States. In opposition to petitioner's discovery motion the government filed a brief in the District Court (certified docket entry No. 251), in which the government argued, *inter alia*, that the United States may not be sued without its consent, and that consent to be sued with others is not implied, and that petitioner not being in privity with the government cannot sue under a contract theory and "obviously cannot make an alleged breach of contract the basis for a tort claim" (p. 3, Government's Brief). The District Court obviously agreed with the government's position and the Court of Appeals affirmed on that basis. From a "fair spontaneous reading" it would seem that the plain language of the Act irrefutably renders the United States liable for defective specifications where the defect falls into a wrongful omission or commission category. Moreover, the decisions below did not take into account the decision of the United States Court of Claims in *Peter Kiewit Sons' Co.* v. *United States*, 138 Ct. Cl. 668, 151 F. Supp. 726, wherein that court held the government liable for negligently interfering with performance of the contract. Although the United States Court of Claims had held the government liable for resulting damages where it is guilty of some act of negligence which delays per-

formance, there is no authoritative decision that such negligence provides the basis for a third party subcontractor's [not in privity] tort claim or counterclaim, setoff or recoupment.

Consequently, an important federal question under the FTCA is presented, namely, does the Act permit tort claims by persons performing subcontracts on government construction projects? While there are several subsidiary questions, their impact on the jurisdictional issue is inconsequential for the purposes of this petition.

An analysis of the evolution of the FTCA clearly indicates that the Act makes the government liable to petitioner for the government employed draftsman's negligence in improperly preparing the plans and specifications, because Florida law would impose liability on private persons or corporations under similar circumstances. *Rayonier, Inc.* v. *United States,* 352 U.S. 315, Cf., *Gallichio* v. *Corporate Group Service, Inc.* (1969), 227 So.2d 519.

The United States has recently recognized the problem of defective specifications. The Department of Defense, Armed Services Procurement Regulation Committee, proposed a Defective Specifications[1] clause for government construction contracts protecting contractors. However, such a relief clause has never been adopted.

This case presents an important aspect of the still undetermined extent of the government's liability under the FTCA. If the controversy were between the government and its prime contractor the contractor would rely upon the implied warranty, *United States* v. *Spearin,* 248 U.S. 132, and be able to recover in the Court of Claims, *Laburnum Construction Corporation* v. *United States,* 163 Ct. Cl. 339, 325 F.2d 451. Again, lack of privity harshly

1. See *Administrative Resolution of Government Breaches—The Case for an All-Breach Clause,* 28 Fed. B. J. 199, 202.

precludes the subcontractor from any contractual remedy, except perhaps at the whim of the prime as to whether or not it may or can sue the government in the court of claims.

The decision below casts a cloud upon the right of a subcontractor to avail itself of the provisions of the FTCA.

As a general rule, subcontractors may not present claims or appeals to boards of contract appeals arising out of the performance of their subcontracts with prime government contractors. There is no privity of contract between the subcontractor and the government which will require the government to be responsible for the performance of the prime contractor's obligations to the subcontractor. However, the prime contractor, if the subcontract does not provide otherwise, may bring a claim or appeal on behalf of the subcontractor in his own name when he himself has been involved in the matter in dispute. The prime contractor's decision not to appeal to the Board or to sue the government in these circumstances leaves subcontractors wholly without remedy unless they are permitted a claim under the Act. Normally, the prime contractor processes an appeal as a result of change orders or other non-negligent causes for increases in performance expenses of subcontractors. However, where negligence of the government enters the picture, unless the Act is construed to provide him a remedy, the subcontractor is effectively precluded a means for relief.

Lastly, as regards this particular point in the jurisdictional spectrum the Court's attention is directed to its language in *Dalehite* v. *United States,* 346 U.S. 15, 35-36:

> "It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation."

Clarification is desirable to point out that the specifications referred to in that opinion are not construction specifications as are involved in this case.[2]

In these circumstances, we believe that it is in the interest not only of the many subcontractors, but of the government, that the matter be definitively resolved at the earliest possible time. Since the court below affirmed the summary judgments in favor of respondents while reversing the summary judgment in favor of Fryd and Travelers, petitioner, even if successful in the trial court, cannot now obtain complete relief because those summary judgments required Fryd to make payment to both the government and American out of petitioner's money withheld by Fryd. Res judicata would also present a problem.

2. Although differing in circumstances, directly in conflict with the decision of the Fifth Circuit in the instant case (on the essential point) is the decision of the United States Court of Appeals for the Tenth Circuit in *United States* v. *Martin,* 267 F.2d 764, printed in the appendix, *infra,* pp. A17-A30.

In this present controversy, the United States intervened in the Miller Act case, pursuant to the Federal Rules of Civil Procedure. In utilizing the rules of procedure, the government "subjects itself to the procedure and rules of decision governing the forum which it has sought." *United States* v. *Martin, supra.* Consequently, petitioner utilized Rules 8(c), 13(a) and 13(d) Rules of Civil Procedure, dealing with affirmative defenses and compulsory counterclaims which it had an absolute right to do. See footnote 1 in *City of Newark* v. *United States,* 254 F.2d 93, which also conflicts with the opinion below.

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2. A symposium on Federal Tort Claims Act, which includes an analysis of the evolution of the Supreme Court's concept, appears in 26 Fed. B. J. 35.

Petitioner here pled the negligence of the government as an estoppel and also as the basis for setoff and counterclaim for damages. Both the tax claim of the United States and the damages to petitioner grew out of the performance by petitioner of its subcontract.

Petitioner's pleading clearly set forth matters germane or reasonably incident to the government-instituted complaint.

It is believed that the opinion of the Tenth Circuit in *United States* v. *Martin, supra*, is the correct one, and that its ruling "that when the United States institutes a suit, it thereby consents by implication to the full and complete adjudication of all matters and issues which are reasonably incident thereto. * * * We think it may also be said that a litigable interest which is or may be germane to a government-instituted suit and which may be adversely affected by a judgment therein, is reasonably incident to the relief sought, and therefore is within the rule of consent by implication.", should be declared the applicable law.

The decision below also is in conflict with a comparable decision of the United States Court of Appeals for the Fourth Circuit in *Thompson* v. *United States*, 250 F.2d 43, and is probably in conflict with the decisions of this Court in the cases of *Bull* v. *United States*, 295 U.S. 247 and *United States* v. *Yellow Cab Co.*, 340 U.S. 543. At least one opinion so holds. In *United States* v. *Southern Pacific Co.*, 210 F. Supp. 760, printed in the appendix, *infra*, pp. A31-A34, the United States District Court for the Northern District of California held that counterclaims under the FTCA are to be allowed when the claim of the United States originates out of the same circumstances.

The Fourth Circuit, in *Thompson, supra,* expressed the opinion that counterclaims under the Tucker Act, 28 U.S.C. and 1346(a)(2), may be asserted in an action instituted by the United States. This case is analogous in that the Tucker Act is the contract counterpart to the FTCA. In addition, the rationale of the California District Court would seem to be preferable and applicable to the instant case.

These conflicting decisions should be resolved because the massive volume of Miller Act litigation continues to grow even larger.

3. The court below has so far sanctioned a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision. In granting summary judgment, the trial court resolved these factual issues in favor of respondents and adversely to petitioner. Our statement of the case makes clear that there are sharp conflicts in the evidence as to both respondents. This is particularly true as to American Fire & Casualty Company as regards its wrongful takeover of petitioner's subcontract.

In affirming the summary judgments, the court sanctioned the failure by the trial court to consider the affidavits and depositions on file in opposition to the motions for summary judgment. Rule 56, Federal Rules of Civil Procedure, unequivocally requires that the trial court consider not only the pleadings and depositions and affidavits in support of the motion, but those in opposition thereto as well. The trial court did not do so in rendering the summary judgment for the United States.

Petitioner's affidavits in opposition to the motions and the evidence on file in the depositions and pleadings unquestionably satisfied the requirement of the summary

judgment rule. Consequently, the failure of the United States District Judge to consider *all* of the "pleadings, depositions, * * *, together with the affidavits, * * *" violated the rule and clearly constituted a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Accord, *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U.S. 620; *Free* v. *Bland,* 369 U.S. 663. This Court has recently held that summary judgment should be entered *only* when the pleadings, depositions, affidavits and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Poller* v. *Columbia Broadcasting, Inc., et al.,* 368 U.S. 464; *Fortner Enterprises, Inc.* v. *United States Steel Corp. et al.,* 394 U.S. 495.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the writ allowed.

Respectfully submitted,

JOSEPH M. GLICKSTEIN, JR.
1205 Universal Marion Building
Jacksonville, Florida 32202
Counsel for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING CO., Plaintiff,

vs.

FRYD CONSTRUCTION CORPORATION, a Florida corporation, et al., Defendants,

AMERICAN FIRE & CASUALTY COMPANY, a Florida corporation, and UNITED STATES OF AMERICA, Intervenors.

No. 65-153-CIV-EC

SUMMARY JUDGMENT

THIS CAUSE came on to be heard upon the motion for summary judgment of AMERICAN FIRE & CASUALTY COMPANY (AMERICAN) against the use-plaintiff, T/N PLUMBING & HEATING COMPANY (T/N) and the defendants, FRYD CONSTRUCTION CORPORATION (FRYD) and TRAVELERS INDEMNITY COMPANY (TRAVELERS), and the motion of AMERICAN for summary judgment as to priority over the claim of the UNITED STATES OF AMERICA (UNITED STATES) for taxes due, and the Court having examined the pleadings, having heard argument of counsel, having considered the evidence in support of and in opposition to the said motions, and being otherwise fully advised in the premises finds that there is no genuine issue as to any material fact, and that AMERICAN is entitled to the judgment hereafter entered in its favor as a matter of law. The Court finds specifically:

1. In connection with obtaining the surety bonds from AMERICAN, T/N entered into agreements in writing with AMERICAN wherein and whereby among other things, T/N, under certain conditions, assigned the proceeds of its subcontracts with FRYD to AMERICAN and agreed to reimburse AMERICAN for any funds advanced in its behalf together with costs, interest and attorney's fees; that in connection with the written agreements and pursuant to the obligations imposed upon it as surety, AMERICAN did advance sums on behalf of T/N all in accordance with the conditions of said agreements, and T/N is indebted to AMERICAN for sums advanced, in the sum of $13,439.03.

2. FRYD has in its possession the unpaid balance of the subcontract price between FRYD and T/N in excess of $13,439.03. Pursuant to the subcontract between FRYD and T/N, FRYD lawfully withheld these sums from T/N and AMERICAN for the reason that conflicting claims to the sums in FRYD's possession were made by a number of claimants, including but not limited to T/N, AMERICAN and the UNITED STATES.

3. The UNITED STATES now admits that the claim of AMERICAN to these sums is paramount and superior to the claim of the UNITED STATES to the extent of $13,439.03.

4. The payment by FRYD of the sum of $13,439.03 to AMERICAN shall be considered a payment on the subcontracts between Fryd and T/N and FRYD shall be given a credit therefor. It is, therefore,

ORDERED AND ADJUDGED as follows:

1. The motion of AMERICAN for summary judgment against the use-plaintiff, T/N be and the same is hereby

granted and AMERICAN do have of and recover from the use-plaintiff, T/N, the sum of $13,439.03.

2. FRYD be and it is hereby ordered and directed to pay to AMERICAN within ten (10) days from the date of this order, the sum of $13,439.03. Upon the payment of this sum, the judgment contained in paragraph 1 shall be satisfied. Upon the failure of FRYD to pay said sum, the Court will upon the certificate of AMERICAN enter a judgment in the sum of $13,439.03 in favor of AMERICAN and against FRYD and its surety, TRAVELERS.

3. The motion of AMERICAN for summary judgment against the UNITED STATES be and the same is hereby granted, and as to the sum of $13,439.03, the Court determines that the claim of AMERICAN is paramount and superior to the claim of the UNITED STATES.

DONE AND ORDERED in Chambers at the United States Courthouse in Miami, Dade County, Florida, this 27th day of November, 1968.

Emett C. Choate
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, for the use and benefit of T/N PLUMBING & HEATING CO., Plaintiff, v. FRYD CONSTRUCTION CORPORATION, a Florida corporation, et al., Defendants, AMERICAN FIRE & CASUALTY COMPANY, a Florida corporation, and UNITED STATES OF AMERICA, Intervenors,	**Case No. 65-153-CIV-EC**

SUMMARY JUDGMENT AND ORDER

THIS CAUSE having come on to be heard upon Motion for Summary Judgment of the United States of America against T/N Plumbing & Heating Company and the Court having examined the pleadings and affidavits submitted in support of the motion and having heard argument of counsel for the respective parties and having been advised that pursuant to this Court's Summary Final Judgment entered in this cause on January 8, 1969, Fryd Construction Corporation has paid over to the United States of America the sum of $9,875.25, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

1. After all due setoffs and credits, T/N Plumbing & Heating Company is indebted to the United States of America for Social Security and Withholding taxes in the total sum of $19,384.66 plus interest according to law.

2. No material issue of law or fact exists.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED

That the United States of America have and recover of T/N Plumbing & Heating Company the sum of $19,-384.66 plus interest according to law.

DONE AND ORDERED at Miami, Florida, this 23 day of January, 1969.

Emett C. Choate
Senior Judge
United States District Court

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27437

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING CO.,
Plaintiff-Appellant,

versus

FRYD CONSTRUCTION CORPORATION, ET AL.,
Defendants-Appellees,

AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(February 19, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: In this Miller Act (40 U.S.C. §§ 270a-270d) matter, suit was brought by use plaintiff T/N Plumbing & Heating Company, a subcontractor, against Fryd Construction Corporation and its surety, Travelers Indemnity Company, for the sum of $111,216.17, plus interest and attorney's fees, alleged to be due for ma-

terial and services furnished in connection with the performance of certain drainage work on a Government construction job at Patrick Air Force Base, Florida, in which Fryd was the general contractor with the Government-owner. The contract was executed on November 30, 1962 on Standard Form 23A.

According to the allegations of the complaint, on December 6, 1962, Fryd entered into a subcontract with T/N to perform drainage work in connection with the Patrick Air Force Base job for the price of $66,140. Use plaintiff T/N further alleged that "As a direct and proximate result of the existence of . . . undisclosed interferences and obstructions" and "at Fryd's special instance and request" it furnished labor and material in prosecution of the work of the fair and reasonable value of $202,879.56 instead of the original agreed figure of $66,140, and that the net sum of $111,216.17 remains due and unpaid. American Fire & Casualty Company, surety on T/N's contract, intervened, claiming right of subrogation and written assignment and indemnification against T/N for sums which it expended on behalf of T/N, pursuant to the obligation under its bond. The United States intervened, asserting a claim for unpaid withholding taxes against T/N.

Fryd and Travelers defend the suit on the ground that the Miller Act is not applicable in this case, that the subcontract was expressly conditioned upon the general contract, that the subcontract required T/N to perform the prime contractor's obligations to the United States, and that the conditions of the general contract control the rights and obligations of T/N. According to the defense, Fryd and Travelers assert as to the disputed additional sum claimed by T/N, that the parties agreed to convert the dispute into one arising under the contract and, therefore, that the claim of T/N is limited to the specific equitable

adjustments provided for in the general contract, especially Clause 6 relating to "disputes." The prime contractor contends that the subcontract incorporates, by reference, specific provisions of the general contract and cites the following provisions of the subcontract in support of this contention:

> "14. This contract includes all of specifications, general conditions, and/or special conditions."

Further, from pertinent parts of paragraph 2:

> "The following recitals are hereby declared to be true:
>
> "(a) WHEREAS, the contractor and the owner have entered into a contract for the doing of the work therein described, with the terms of which contract the subcontractor acknowledges himself to be familiar; and
>
> "(b) WHEREAS, the said general contract, and the plans, specifications and drawings described specifically the scope of the work which is required of and from the subcontractor to whom this subcontract is to be awarded; . . . ."

Additionally, the prime contractor points to these provisions of the subcontract:

> "3) The subcontractor hereby agrees to do all the work and furnish all the materials required by the terms of the plans, specifications and drawings, and by the terms of the general contract, of and from the drainage structures subcontractor; and the subcontractor covenants and agrees with the contractor that the subcontractor will cause the said work to be done in such manner as will conform to and will comply with the relevant portions of the general or prime contract; and, in general, the parties understand and agree that the subcontractor shall do the subcontractor's portion

of the work in such manner that if it were being done by the contractor, it would comply with the relevant portions of the general or prime contract."[1]

Thus the prime contractor argues that there has been incorporated, by reference, into the subcontract the provisions of the general contract, included among which is the following paragraph:

"6. DISPUTES

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged. Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal

1. Additionally, the prime contractor refers to the following provision of the subcontract:

"12. The Subcontractor agrees to furnish all labor, equipment and material to complete all work as follows: Sec. # 77, drainage structures; Sec. # 65 excavation, trenching and backfilling for utilities system as applicable. The work under Sec. # 77 will be accomplished in acordance with the unit price schedule as set forth in bidding document for amounts as follows:"

> proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

From this the prime contractor concludes that the subcontractor has waived its right to sue under the Miller Act and has only those rights set forth in the specific equitable adjustments herein quoted and as provided for in the general contract.

Fryd argues that the provisions of the subcontract between it and T/N evidence this intention. Fryd refers to the following provisions of the subcontract in support of this contention:

> "8) While the subcontractor is not in default in the performance of the terms of this contract, the contractor will pay the subcontractor the contract price in the following fashion: to wit:
>
> "(a) Progress payments shall be made on the basis of requisitions made by the subcontractor on the as disbursed by Owner days of each month (sic); and each requisition shall include an amount which is the fair cost or value and is also the fair proportion of the total work, included in the period covered by such requisition; and in general, the subcontractor shall never be entitled to include in any requisition any requirement for the payment of money which the contractor himself would not have been entitled to receive, for such work, under the terms of the general or prime contract; ....."

Reference is further made by Fryd to the following provision of the subcontract:

> "9) It is further understood and agreed by and between the parties as follows:
>
> . . . .

"(d) . . . it is understood and agreed by and between the parties that the subcontractor shall never be entitled to receive any payment under this contract from the contractor unless and until the contractor has received from the owner a payment which includes, correspondingly, payment for the work which is covered by the requisition of the subcontractor."

We have had occasion recently to consider a similar case under the Miller Act involving the suit of a subcontractor against a prime contractor, namely, *H. W. Caldwell & Son, Inc. v. U. S. for John H. Moon & Sons, Inc.*, 5 Cir., 1969, 407 F. 2d 21. In *Caldwell*, the claim of the subcontractor was for the balance owing for regular work performed under the subcontract and extra work resulting from the prime contractor's delay in performing. Caldwell, the prime contractor, contended that Moon, the subcontractor, was bound by the "disputes" clause of the prime contract because in the subcontract, the contractor and subcontractor agreed to be bound by the terms of the prime contract including its general and special provisions. Thus Caldwell argued that Moon had no right to bring a Miller Act suit but was bound by the "disputes" provision of the general contract requiring that the subcontractor pursue its remedies only under that clause. We said in *Caldwell* that the benefits of the Miller Act are primarily intended for subcontractors, 407 F. 2d at 23, and that "the courts do not favor finding that a subcontractor has contractually abandoned his rights under the act." We held that for the principal contract's "disputes" clause to be applicable between the general contractor and a subcontractor, there must be a provision in the subcontract making the "disputes" clause expressly applicable. 407 F. 2d at 23.

As in *Caldwell*, there is no such express provision in the subcontract between T/N and Fryd.[2] We hold, therefore, as we did in *Caldwell*, that a general incorporation by reference, of the terms of the principal contract refers only to "the quality and manner of the subcontractor's work, not the rights and remedies he may have against the prime contractor." 407 F. 2d at 23. See also, to the same effect, *Warrior Constructors, Inc. v. Harders, Inc.*, 5 Cir., 1967, 387 F. 2d 727; *United States for the Use of B's Company v. Cleveland Electric Co. of South Carolina*, 4 Cir., 1967, 373 F. 2d 585; *Fanderlik-Locke Co. v. United States for the Use of M. B. Morgan*, 10 Cir., 1960, 285 F. 2d 939, 942-943; *Beacon Construction Co. of Mass. v. Pre-pakt Co.*, 1 Cir., 1967, 375 F. 2d 977, 980-981.

The District Judge granted summary judgment in this case against use plaintiff T/N and in favor of Fryd and Travelers, American Fire & Casualty Company and the United States. In granting summary judgment in favor of Fryd and Travelers, the District Court said in part as follows:

> "The subcontract was expressly made subject to the prime contract and to conditions contained in the subcontract. Among the subcontract conditions which bear on the issues are the following. The subcontract provides for a fixed subcontract price in Paragraph 7 thereof, and provides that there shall be no addition thereto or change in the amount thereof unless accomplished by a written instrument signed by both parties. This provision is binding and enforceable and except for the equitable adjustments authorized throu the administrative procedures described herein no

2. Curiously enough, in the Fryd-T/N subcontract there is a numbered provision as follows:

> "15. The Subcontractor acknowledges the inclusion of Clause #21 Standard Form 23A and all clauses set forth in Standard Form 19A as part of his contract, as set forth in Part 1 of the General Conditions of the specifications."

except for the equitable adjustments authorized through thorized by an instrument in writing signed by the parties. In addition, the subcontract provides and the subcontractor agreed, that it would never be entitled to receive any payment under the subcontract from the prime contractor unless and until the prime contractor has received from the Government a payment which includes, correspondingly, payment for the work which is covered by the requisition of the subcontractor. This provision is binding and enforceable and except for the sums which the Court heretofore found (in the Summary Judgment filed December 30, 1968, in this cause) that FRYD had lawfully withheld as a result of conflicting claims, all of the funds received from the Government as payment for the work under the subcontract have been paid to use plaintiff."

The reasons given by the District Court for granting summary judgment in favor of Fryd and Travelers are erroneous as a matter of law and are opposed to our holding in *Caldwell*, supra, as well as those of numerous other circuits whose decisions we have previously cited. We disagree, therefore, with the lower court's decision that the only remedy available to use plaintiff is to be found in "the equitable adjustments authorized through the administrative procedures" provided in the general contract between Fryd and the Government-owner. We also disagree with the contention of the prime contractor that the circumstance of appellant's participation and cooperation with Fryd in the presentation of claims to the Armed Services Board of Contract Appeals estops appellant from asserting its claim here. The general contract here is between Fryd and the Government. T/N is, therefore, without standing before the Board and its conduct does not justify a holding of waiver or estoppel. In this regard we said, in our recent decision in *Warrior Constructors, Inc. v. Harders, Inc.*, 5 Cir., 1967, 387 F.2d 727, 729, the following:

"Since there is no contract, express or implied, between a subcontractor and the government, there is no procedure by which the claim of a subcontractor can be presented against the United States except as it may become a claim of the prime contractor. A subcontractor has no standing before the Contracting Officer or the Board of Contract Appeals, and no provision is made for the hearing of disputes between a prime contractor and a subcontractor. The remedy for a subcontractor seeking to recover for labor and materials furnished on a government contract is unde rthe Miller Act, and it has been held that when a prime contractor has a claim for the same amounts pending under the 'disputes clause' of the prime contract, a subcontractor's claim under the Miller Act is not affected."

Since we hold that T/N did not waive its rights under the Miller Act and that the summary judgment in favor of Fryd and Travelers is erroneous as a matter of law, it is necessary that we reverse and remand for a full evidentiary trial on the merits. It is obvious that there are complicated issues of fact to be tried which do not lend themselves favorably to disposition by summary judgment. Obviously, there is a dispute as to the nature and extent of the furnishing by T/N of material and services on the Patrick Air Force Base job; also, as to whether there were obstructions and interferences to T/N's performance, whether Fryd directed T/N to perform additional work and waived the provisions of the contract requiring such additions to be reduced to a written agreement between the parties. (See subcontract, paragraph 7.) There are undoubtedly numerous additional issues of material fact which can only be resolved by taking of evidence at a trial. The disputes between T/N and Fryd cannot properly be resolved, therefore, by motion for summary judgment. See Fed. R. Civ. P., Rule 56.

It is quite a different matter, however, as to granting of summary judgment in favor of intervenors, American Fire & Casualty Company and the United States of America. The amounts paid by T/N's surety company, American, were not disputed, and reasonable and necessary attorney's fees were properly assessed. Nor was the amount of withholding taxes due intervenor, the United States, disputed. T/N's counterclaim against the United States cannot properly be used as an offset to this tax claim because T/N was not privy to the contract between the United States and Fryd, *Warrior Constructors, Inc.* v. *Harders, Inc.*, 5 Cir., 1967, 387 F. 2d 727, 729. Since T/N could not have brought an original suit against the United States, it may not defend by setoff or counterclaim the tax claim of the United States. See *United States* v. *Patterson*, 5 Cir., 1953, 206 F. 2d 345. These summary judgments must, therefore, be affirmed.

REVERSED AND REMANDED as to judgment in favor of Fryd and Travelers; AFFIRMED as to judgments in favor of American Fire & Casualty Company and the United States of America.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27437

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING CO.,
Plaintiff-Appellant,

versus

FRYD CONSTRUCTION CORPORATION, ET AL.,
Defendants-Appellees

AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 13, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM: The petitions of plaintiff-appellant and defendants-appellees for rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the suggestion of defendants-appellees for rehearing en banc is DENIED.

UNITED STATES of America,
Appellant,

v.

Earl MARTIN and De Berard Cattle Company,
Appellees.

No. 5960.

United States Court of Appeals
Tenth Circuit.
May 27, 1959.

Rehearing Denied July 1, 1959.

Before MURRAH, PICKETT and LEWIS, Circuit Judges.

MURRAH, Circuit Judge.

This is an appeal from an order of the trial court allowing appellees to jointly intervene, and from a judgment on De Berard Cattle Company's counterclaim, in this declaratory class action by the United States, for an adjudication of the respective rights of the affected parties, to the use of water of the Colorado River, arising out of the Colorado Big-Thompson diversion project.

This project had for its primary objective the diversion of the waters of the Colorado River from the Western Slope to the Eastern Slope of the Rockies for irrigation purposes, by means of a system of reservoirs, canals and a 13-mile transmountain tunnel. The initial funds for the project were appropriated by the Act of August 9, 1937, 50 Stat. 595, "for construction in accordance with the plan described in Senate Document Numbered 80, Seventy-fifth Congress." The Document, embodying the salient features of the project, was Congressional sanction for a conciliation of conflicting interests of affected water users on both sides of the Rockies. The project, as described in the

Document, contemplated a change in the regimen of the Colorado River with consequent modification of vested water rights on the Western Slope. And, it accordingly provided for the construction of reservoirs to impound and hold surplus waters for the primary purpose: "(1) to preserve the vested and future rights in irrigation", and "(5) to maintain conditions of river flow for the benefit of domestic and sanitary uses of this water." To that end, Paragraph 5(j) of the Document pertinently provided for an "adequate system as determined by the Secretary of the Interior * * * for the irrigation of the lands in the vicinity of Kremmling, now irrigated by either natural or artificial means, and the installation made therefor shall be a part of this project. The rights to the use of water for the irrigation of these lands shall be considered to have a date of priority earlier than that of the rights to the use of water to be diverted through the works of this project to the Eastern Slope."

The Secretary of the Interior was charged with the responsibility of constructing and operating the project for the effectuation of the declared beneficial purposes. And, when the project was near completion, the United States brought this declaratory class action seeking a construction of the provisions of Document 80, and for an adjudication of the rights and liabilities of the affected parties thereunder, including the duties and responsibilities of the Secretary of the Interior to manage and operate the same. It was specifically alleged that by reason of its incorporation by reference in the appropriating act, Senate Document 80 had the force and effect of law and was therefore binding upon the Government and all those who now or hereafter use any of the water impounded and released from the Green Mountain Reservoir; that it was also "contractual in nature" and therefore binding on all parties; and that actual controversies exist concerning the priority

rights and dates of the waters involved in the project, not only between water users on the Western Slope, but as between water users on the Western and Eastern Slopes as well.[1] The affected water users were alleged to fall into three distinct classes: first, those claiming rights in the Colorado River for domestic and irrigation purposes; second, generation of electricity; and third, industrial purposes.

The court was asked, inter alia, (1) to declare whether the United States was legally bound to maintain the project in conformity with the provisions of Senate Document 80, and if so, to adjudicate and determine the nature and extent of the liabilities, duties and obligations owing to the respective parties and classes of which they were representative; to settle all rights and interests between the respective parties as they may arise on the trial of the case, and to quiet the title of the United States and the respective parties to such adjudicated rights.

The Appellees, De Berard Cattle Company, Earl Martin, and others not directly involved in this appeal, are the owners of ranch and meadow lands near the confluence of the Blue and Colorado Rivers, who have for many years depended upon the overflow of the River for natural irrigation of the meadow lands. In their motion to intervene, it was alleged that the controversies between the

1. "XI. Thus, actual controversies exist, not only as to whether the priority rights and dates, to which the Colorado-Big Thompson Project is entitled, to the waters of the Colorado River and the Blue River and their various tributaries are senior to the claim of the defendants, the City and County of Denver, the Moffat Tunnel Water and Development Company and the City of Colorado Springs, but also as to the divergent interests of the water users on the Eastern and Western Slopes of the Rocky Mountains respecting their rights to the water from the Colorado-Big Thompson Project, controversies which directly involve the rights and responsibilities of the plaintiff in the administration of the Colorado-Big Thompson Project and the distribution of the water developed by that project between the opposing parties, and likewise, the nature and extent of the responsibility emanating from said Senate Document No. 80."

United States and these movants were in various particulars different from the controversy between it and other defendants; that the representation of the movants' interest by existing parties is or may be inadequate; that the movants would be bound by any judgment entered in the action; and furthermore common questions of law and fact inhere in the movants' answer and counterclaim and the main action. The answer and counterclaim specifically referred to the declared purpose of Senate Document 80 "to preserve the vested and future rights in irrigation", and "to maintain conditions of river flow for the benefit of domestic and sanitary uses of this water." Reference was also made to Subparagraph 5(j) of the Document relating to the rights of landowners like the intervenors, whose lands were irrigated by natural means, and the duty of the Secretary of the Interior to provide an adequate system for the irrigation of these lands. It was then alleged that the construction of a reservoir upstream from the intervenors' lands had diminished the seasonal overflow of the intervenors' lands, thus depriving them of their vested right to the irrigation of their meadow lands by natural means. It was alleged that the Secretary of the Interior had refused to provide an adequate system for the artificial irrigation of the lands, as a result of which De Berard Cattle Company was compelled to construct a dam and other works on Big Muddy Creek and other like works, which, when completed, would cost more than $5,000. Other items of damages were later claimed by amendment in the aggregate of $10,000 for which judgment was prayed.

After challenging the sufficiency of the counterclaim to state a claim on which relief could be granted, the United States moved to dismiss it as an unconsented suit against it, and as one wholly unrelated to the gravamen of the Government's suit. The court denied the motion to

dismiss, allowed intervention and then entered judgment in the original action in accordance with stipulated facts, fully adjudicating the rights and duties of all the parties to the original action, but reserving the issues tendered by the counterclaim for future disposition.

On the trial of these issues, the court found that the intervenors Martin and De Berard Cattle Company had for many years owned lands which were irrigated by the natural overflow of the Colorado River and its tributaries, and were part of the lands for which the adequate system of irrigation was to be provided under Subparagraph 5(j) of Senate Document 80; that such Document was negotiated and designed to effect contractual relations between the United States and water users whose water rights would be affected by the operation of the project, unless precautionary measures were taken to prevent injury; that the vested interest of the intervenors in the natural overflow of the river had been greatly impaired by the impounding of the water in the reservoirs upstream; that the United States undertook and agreed in Document 80 to provide an adequate system of irrigation for the said lands, but had failed to do so. The court retained jurisdiction in order to give the Secretary of the Interior reasonable time in which to provide an adequate system of irrigation in lieu of the impairment of intervenors' water rights, and when the Government declined to take any further steps, the court then entered judgment in accordance with the findings of fact in favor of the intervenor De Berard Cattle Company, in the sum of $10,000. No final judgment was entered for intervenor Martin, and he has moved to dismiss this appeal for that reason.

[1] Denying that the intervention was authorized by Rule 24, F.R.Civ.P., 28 U.S.C.A., the United States emphasizes the difference in the character of the relief

sought by this counterclaim. The independence of the two actions is said to lie in the fact that in the main suit, the United States sought a determination of the priorities of the various claimed water rights and a construction of its duties and responsibilities under the requirements of Senate Document 80 relating to the release of the water under the system of irrigation, but not including the rights and duties of the Government and the class who, like the intervenors, claim overflow rights in the diverted water. In that regard, our attention is called to the intervenors' pleadings to the effect that the controversy between the Government and the intervenors is "in very essential particulars different from the controversy and dispute between plaintiff and any of the defendants in this case."

True, the declaratory class action failed to name any of the owners of the lands with overflow rights as parties defendant, or as members of a representative class. Indeed, the complaint astutely avoided any reference to overflow rights or to seek their adjudication in the main action. The suit did, however, sweepingly and comprehensively invoke Senate Document 80 and prayed for an adjudication of the rights of the parties having or claiming an interest in the diverted water. The judgment in the main action did not purport to adjudicate the intervenors' asserted rights. But it was entered with an eye to the counterclaim and after the court had taken cognizance of it. We do not know what course the judgment would have taken absent the intervention. As a judgment in a class action, it might very well have been drawn to adjudicate the interests asserted in the counterclaim. In these circumstances, the intervenors should not be expected to suffer a judgment in the proceedings without asserting a litigable interest therein. The motion for intervention pleaded in the language of Rule 24(a) (2)

and (b) (2) F.R.Civ.P. that representation of their interest by the existing parties may be inadequate, and that they may be bound by the action; and that in any event, common questions of law and fact were presented.

[2-4] We agree with the trial court that the motion stated grounds for intervention under Rule 24(a) (2) and (b) (2). But even so, the intervention is not of right or permissive if the relief sought is not within the jurisdiction or powers of the court. For neither forms of action nor modes of procedure operate to confer jurisdiction not otherwise extant. The Government does not ipso facto relax its traditional immunity from suit by becoming a suitor in the courts. United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058. But, the legislative and decisional trend is toward relaxation of governmental immunity. I. e. see National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389; United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523. And, it is now established beyond doubt that "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." United States v. The Thekla, 266 U.S. 328, 339, 45 S.Ct. 112, 113, 69 L.Ed. 313; American Propellor & Manufacturing Co. v. United States, 300 U.S. 475, 57 S.Ct. 521, 81 L.Ed. 751. "This amenability to suit has become a commonplace in regard to the various agencies which carry out 'the enlarged scope of government in economic affairs.'" National City Bank of New York v. Republic of China, supra [348 U.S. 356, 75 S.Ct. 426], quoting from Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784.

[5, 6] From this it may be fairly said that when the United States institutes a suit, it thereby consents by im-

plication to the full and complete adjudication of all matters and issues which are reasonably incident thereto. And, in such role, it "subjects itself to the procedure and rules of decision governing the forum which it has sought." Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 134, 58 S.Ct. 785, 789, 82 L.Ed. 1224. We think it may also be said that a litigable interest which is or may be germane to a government-instituted suit, and which may be adversely affected by a judgment therein, is reasonably incident to the relief sought, and therefore is within the rule of consent by implication. It would seem, therefore, that a counterclaim which meets the requirements of Rule 24(a) (2) would likewise come within the consent by implication rule, hence cognizable in suits of that kind.

[7] But assuming arguendo the counterclaim is not germane or reasonably incident to the main action, the two may permissively be joined if they present common questions of law and fact, provided of course the counterclaim rests upon its own jurisdictional footing. See Thompson v. United States, 4 Cir., 250 F.2d 43. The Government pleaded Document 80 "as having the effect and force of law * * * and contractual in nature, and is therefore binding on all persons." The intervenors likewise pleaded the Document as a binding contract, and the trial court found that it was "designed to effect contractual relations between the United States and water users whose existing rights would be affected or impaired by the operation * * *" of the project. The Government now, however, denies that the Document imposed any contractual obligations on it. It says that it was "merely a recommendation to Congress, not a contract" on which any interested party could sue as under the Tucker Act, 28 U.S.C.A. §§ 1346, 2401.

[8, 9] We fail to find any explicit promise to assume a direct obligation to compensate any of the affected

parties for any injury caused by the construction and operation of the project. In the view we take of the counterclaim, however, it is unnecessary to decide the exact obligations imposed upon the Government by the terms and provisions of the Document. It is sufficient for jurisdictional purposes and for the purposes of full and complete relief that the Document did without doubt recognize the vested rights of the intervenors in the overflow of the Colorado River for the natural irrigation of their meadow lands. Indeed, even without such recognition, Colorado law vouchsafes it to them.[2] Cf. United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231; United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539. Having that vested right, it cannot be taken for public purposes, such as this project, without imposing upon the Government the constitutional duty to pay just compensation therefor. Even without a contract the law implies a promise to pay just compensation for private property taken by the Government for public purposes. The implication is in consonance with the constitutional duty of the Government, and with common justice. United States v. Lynah, supra. The counterclaim asserts a vested interest in the natural overflow rights of the diverted waters and the impairment thereof by the operation of the project. It therefore states a claim upon which relief can be granted as one arising out of a constitutionally implied contract

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2. Colorado Revised Statutes 1953 Ann. 147-3-14 provides:

"*Irrigation of meadows.*—All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, in case the diminishing of the water supplied by such stream from any cause, shall prevent such irrigation therefrom in as ample a manner as formerly, shall have right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor. Their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time they first occupied and used such land as meadow ground."

within the meaning of the Tucker Act. 28 U.S.C. § 1346. United States v. Lynah, supra; United States v. Dickinson, 331 U.S 745, 67 S.Ct. 1382, 91 L.Ed. 1789; United States v. Gerlach Live Stock Co., supra; United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109.

[10] The trial court found from the evidence that the intervenors' "natural overflow rights were clearly impaired by the construction and operation of the Big-Thompson project." We cannot say that finding is clearly erroneous. Such impairment was undoubtedly a taking or appropriation of vested property rights for public purposes. And, just compensation therefor required by the Constitution is not left to administrative discretion, unless of course the affected parties so agree. This counterclaim was tried and decided on the theory that the parties did in effect agree that an adequate artificial irrigation system was to be provided in lieu of the impairment of the natural overflow. If the parties reached an accord on that basis, we should not hesitate to give legal effect to it by determining the obligations it imposed and whether they had been fulfilled. But, whatever may be said for the Document, we do not think it was intended to confer upon the Secretary the power and authority to decide just compensation to be awarded for the taking of the overflow rights. Surely the Government cannot deny the force and effect of the Document as a binding contract, and at the same time plead that part of it which purports to commit to the Secretary of the Interior discretion whether just compensation has been provided for that which was taken.

[11, 12] Nor must the intervenors stand or fall on the theory relied upon and on which relief was granted. Instead, they are entitled to recover on any legally sustainable theory supported by the proof. Hamill v. Maryland Casualty Co., 10 Cir., 209 F.2d 338; Dotschay for Use

and Benefit of Alfonso v. National Mutual Ins. Co., 5 Cir., 246 F.2d 221. Nor are they bound by the prayer for relief, for it is no part of the claim. Preas v. Phebus, 10 Cir., 195 F.2d 61. It is sufficient that the court has found from the facts that vested property rights have been taken by the Government for public purposes. The Constitution affords the measure of the remedy, and the statute provides the procedure. The applicability of both to our facts is unmistakably plain.

[13, 14] The question then is the amount of just compensation—usually the fair value of that which was taken. An adequate irrigation system, or the cost thereof, judicially determined, may indeed equal just compensation for the impairment of the overflow rights. Ordinarily, monies expended in anticipation of a constitutionally compensable taking are not recoverable as such, see Ogden River Water Users' Ass'n v. Weber Basin Water Conservancy, 10 Cir., 238 F.2d 936, 942. They may, however, be competent evidence of just compensation, or the fair value of the right taken, such as the cost of preventative measures taken to prevent loss. See United States v. Dickinson, supra.

[15] The proof in support of the judgment is that in 1940, De Berard spent certain sums of money in the construction of an irrigation system, and additional sums in 1950 and 1951, aggregating $10,000. The trial court specifically found that these expenditures were made necessary and were proper in order to irrigate the lands, and to minimize the damages caused by the failure of the Government to provide a substitute system of irrigation. But we cannot determine from the record whether the amounts expended on the irrigation system in 1940 were intended to provide a substitute irrigation system as a preventative measure, or whether they were expended for the

purpose of supplementing the inadequate seasonal overflow, as the Government contends. So also, we cannot determine whether the expenditures in 1950 and 1951 were for compensable purposes. Nor can we determine from the record whether the expenditures were made by De Berard individually, or the corporation, so as to be recoverable by it as just compensation. And see United States v. Dow, supra. Inasmuch as the case was not tried on the theory of just compensation for the property rights taken, we cannot tell whether the proof supports the judgment on that theory, and we think, therefore, it must be vacated and the case remanded for reconsideration in accordance with the views herein expressed.

[16] The Government pleads the six-year limitations as a jurisdictional bar to the maintenance of the suit under the Tucker Act. See 28 U.S.C. § 2401. No claim could accrue under the Tucker Act before the fact of taking could no longer be in controversy. And, since the fact of taking in our case is determinable only from physical evidence of seizure we must look for the ultimate act of diversion by operation of the project for the accrual date of the claim. See United States v. Dickinson, supra; United States v. Dow, supra. The record is not clear when the project reached the point of diverting the water so as to impair the intervenors' rights. The first Congressional appropriation for the project was in 1937. According to the pleadings, the project was in the process of construction in 1949, when the main action was commenced. Certainly the counterclaim would not mature until the completion of the project and it was undoubtedly within six years from the date of the filing thereof.

Martin's Motion to Dismiss the Appeal

[17, 18] The original counterclaim apparently was in the nature of a class action in which a single claim was stated for joint relief. The intervenors, however, attempted to amend or supplement the original counterclaim to pray for damages to De Berard Cattle Company only in the sum of $10,000, in order to conform to the proof, and "to enable the De Berard Cattle Company to ask for the full amount of damages to which any person or corporation is entitled under the Tucker Act * * *" and "that the amount of damages above set forth is claimed by the De Berard Cattle Company and not by the intervenor, Earl J. Martin." In the colloquy between court and counsel, however, in which the amendment was allowed, the court indicated that he was allowing it only to claim $10,000 damage instead of the original claim for $5,000. As a single claim, it was not divisible for purposes of an appealable judgment. As multiple claims for separate and several judgments, it was not divisible for purposes of separate appealable judgments without an expressed determination required by Rule 54(b) F.R.Civ.P.[3] Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297; Burkhart v. United States, 9 Cir., 210 F.2d 602; Cold Metal Process Co. v. United Engineering & Foundry Company, 351 U.S. 445, 76 S.Ct. 904, 100 L.Ed. 1311.

3. "(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

In its findings of fact and conclusions of law, the trial court adjudicated Martin's asserted rights, but no judgment was entered in behalf of Martin, and the court refused to dismiss the claim as to him, apparently leaving the claim ripe for judgment at some future and appropriate time. And, the parties apparently agree that no appealable judgment was entered either for or against Martin.

In this posture of the case, this court is without jurisdiction to entertain the De Berard judgment absent compliance with Rule 54(b). Since, in any event, the case is to be remanded for further consideration, we will assume that on remand, the court will give proper consideration to requirements of the applicable rule.

UNITED STATES of America,
Plaintiff,

v.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

SOUTHERN PACIFIC COMPANY, a corporation,
Counterclaimant,

v.

UNITED STATES of America,
Counterdefendant.

Civ. No. 40665.
United States District Court
N. D. California, S. D.
Nov. 16, 1962.

WOLLENBERG, District Judge.

The government seeks to recover fire suppression costs and damages because of the alleged negligence of the defendant, Southern Pacific Co., on July 8, 1957. Defendant has filed a counter claim for its fire suppression costs alleging wrongful and negligent acts of the government on the same day, July 8, 1957, involving the same fire.

The government seeks to dismiss the counter claim on the grounds:

1. That the Federal Tort Claims Act, 28 U.S.C. § 1346, et seq., does not allow counter claims, but only actions originally instituted by private parties; and

2. That because the complaint was filed April 20, 1962, the counter claim was necessarily filed more than two years after the cause of action arose and is therefore barred by the statute of limitations, 28 U.S.C. § 2401(b).

In United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951) the Supreme Court said:

> "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. * * * Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."

[1] It is desirable to permit a defendant to interpose in the government's action any counter claim arising out of the same circumstances as the government's claim and based on a claim to which the United States has consented to be sued, and obtain an affirmative recovery when warranted, rather than require the claimant to institute a separate and original action. This is the rule in admiralty as to counter claims arising out of the same subject matter, United States v. The Thekla, 266 U.S. 328, 45 S.Ct. 112, 69 L.Ed. 313 (1924) and this is the rule in certain districts on counter claims arising under the Federal Tort Claims Act, United States v. Schlitz, 9 F.R.D. 259 (E.D.Va.1949); United States v. Rosati, 97 F.Supp. 747 (D.N.J.1951). These seem to this court to be the better reasoned cases. (See 3 Moore's Federal Practice, Vol. III, 1961 Supplement, pp. 28 and 29 for an accumulation of the cases both for and against this position.)

[2] While the statute of limitations never applies to a defense being used as a recoupment, Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1934), it appears the more desirable policy is to allow defendant's counter claim when the government chooses to bring its action after the appropriate statute of limitations could have run against it, [as it often does and is always allowed to do, United States v. Knight, 14 Pet. 301 at 315, 10 L.Ed. 465 (U.S. 1840) and has chosen to do here] on the theory of

waiver by the government. United States v. Capital Transit Co., 108 F.Supp. 348 (D.D.C.1952). As Judge Youngdahl stated in the well reasoned Capital Transit case,

> "It is the Court's opinion that the United States in bringing such an action submits itself to the jurisdiction of the Court for the determination of all issues that might arise from the accident between the parties involved. It would seem to be contrary to the spirit of the Federal Tort Claims Act to permit the United States to wait until the two years have expired and then sue an individual for damages and prevent such individual from having litigated all issues which might properly have been determined within the two year period. * * *"

Judge Murphy of this district court in United States v. W. H. Pollard Co., 124 F.Supp. 495 (N.D.Cal.1954) in deciding the identical issue reached the opposite conclusion. While stating his sympathy for the defendant, he felt bound to follow United States v. Shaw, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940). But not only does Shaw not deal with tort claims against the government, it was decided eleven years prior to Yellow Cab and six years prior to the passage of the Federal Tort Claims Act. (Title IV of the Legislative Reorganization Act of 1946; 60 Stat. 843). We do not feel bound to follow the Shaw case.

[3] The general rule is that when a statute which creates a right unknown to the common law includes within it a limitation of time, the expiration of that time extinguishes the right to sue and not merely the remedy, and, therefore it cannot be waived for any reason, The Harrisburg, 119 U.S. 199, 214, 7 S.Ct. 140, 147, 30 L.Ed. 358 (1886); The Isonomia, 285 F. 516 (2nd Cir., 1933); Adams v. Albany, 80 F.Supp. 876 (S.D.Cal.1948) (tort claim against the government). But we feel, in the light of Yellow Cab, United States v. Aetna Casualty & Surety Co.,

338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171 (1949), and the policy considerations stated below, that the general rule stated above should not be applicable to the Tort Claims Act.

The fictions of sovereign infallibility and governmental dignity cannot be used as a rationale to narrowly interpret the Tort Claims Act. More important considerations prevail in a complex society, such as the interference with governmental functions and the burden on public finance. These must be balanced against individual injustice, division of the social risks and the policy against multiplicity of suits. Since the government has seen fit to allow this suit against it on an individual's own initiative, the arguments for treating the government as a private party would be treated in counter claims against it are overwhelming.

The court holds that counter claims under the Federal Tort Claims Act are to be allowed when the claim of the United States originates out of the same circumstances and is of the same nature as the counter claim; and that if the United States waits until the two year period has expired and then brings an action for damages it impliedly waives the right to assert the statute of limitations against a defendant interposing a counter claim.

The motion to dismiss is denied.